IN THE

Supreme Court of the United States

_____ TERM, 1976

No. 75-1130

MR. ALBERT L. NIVENS,
Petitioner,

versus

SIGNAL OIL & GAS COMPANY,
LOUISIANA OFFSHORE CATERERS, INC.,
TRAVELERS INSURANCE COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DONALD V. ORGAN
427 Gravier Street
New Orleans, Louisiana 70130

MICHAEL D. MEYER
On the Brief

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1611

INDEX

TABLE OF AUTHORITIES

CASES:

TABLE OF AUTHORITIES (Continued)

STATUTES

IN THE
SUPREME COURT OF THE UNITED STATES
_____ TERM, 1976

_____

No.

_____

MR. ALBERT L. NIVENS,
Petitioner,

versus

SIGNAL OIL & GAS COMPANY,
LOUISIANA OFFSHORE CATERERS, INC.,
TRAVELERS INSURANCE COMPANY,
Respondents.

_____

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

_____

Mr. Albert L. Nivens, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit dated October 8, 1975.

CITATIONS TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, printed in Appendix "A" is reported at 520 F.2d. 1019.

The opinion of the United States Court of Appeals for the Fifth Circuit, printed in Appendix "B", denying the petition for rehearing and for rehearing en banc, is reported at 523 F. 2d. 1382.

A copy of the judgment of the United States District Court for the Eastern District of Louisiana, entered on the twelfth day of March, 1974, is printed in Appendix "C".

JURISDICTION

The statutory provision which confers jurisdiction on the Supreme Court is found in 28 U.S.C.A. Sec. 1254 (i) which reads as follows:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

QUESTIONS PRESENTED

The following question is presented for review: (1) Whether the Court of Appeals, in an action brought under the Outer Continental Shelf Lands Act (43 U.S.C. Sec. 1331) erred in holding as follows:

> It is a question of law and not of fact whether manifestations of injury, occurring simultaneously with a tort are consequential

> or inconsequential in determining if a plaintiff's known injuries constitute 'whatever is notice enough . . .' to place a reasonable man on guard, thereby triggering the running of prescription.

The Court of Appeals reversed a judgment of the District Court which was based upon a jury verdict in which the jury specifically held that the petitioner had brought his suit within one year (L.S.A.-C.C., Article 3536) of the day he knew, or by the exercise of reasonable care, should have known that he suffered damage. It is petitioner's contention that such a holding deprives him of his right to trial by jury on fact issues as secured by the United States Constitution, Seventh Amendment. The law of the adjacent state, in this case, Louisiana, is adopted by the Outer Continental Shelf Lands Act as surrogate law. See *Rodrigue v. Aetna Casualty & Surety Co.*, 89 S. Ct. 1835, 395 U.S. 352, 23 L. Ed. 2d 360 (La. 1969). Petitioner suggests that the decision complained of is contrary to Louisiana jurisprudence wherein the determination above-mentioned has always been treated as a fact issue.

STATEMENT OF THE CASE

Petitioner, Albert Nivens, was employed by Louisiana Offshore Caterers as a cook and housekeeper working on Signal Oil & Gas Company stationary platform on the outer continental shelf in the Gulf of Mexico. While preparing a meal, Mr. Nivens struck his head on a cabinet door. The point of the blow was above the bridge of the nose. There is no longer any dispute as to the negligence on the part of

Signal. Petitioner testified that he did not know he was injured. He did testify that he had a headache and a bump on his head, but he did not bleed, lose time from work, or seek or receive medical attention. Subsequent developments more than a year later revealed that he actually had suffered a skull fracture at the base of the brain, allowing spinal fluid to drain out through his nostrils, resulting in permanent brain damage following brain surgery. Nivens then brought a damage suit against Signal based upon negligence.[1]

1 Prior to this incident, Mr. Nivens was under the care of one Dr. Hagan for allergic symptoms. One of the symptoms from which he was suffering was drainage of pus from his left ear. Some time after the incident with the cabinet door, Mr. Nivens began to drain clear fluid from his nose. He was not aware of the period of time that elapsed between the point of impact and the time this leakage began. In any event, there were no signals or manifestations of which he was aware that would enable him to connect, in his mind, the nasal discharge and the cabinet door incident. The nasal drainage was intermittent, and occurred mostly during the evening hours. Mr. Nivens related the nasal drainage to Dr. Hagan, the doctor who had treated him for the allergy. He was receiving a serum from Dr. Hagan for the allergy, and was referred to a Dr. Palomeque, an allergy specialist. During the course of this period, he brought his pillow case, which was saturated upon occasion by the watery discharge, in order that it be examined, and Mr. Nivens was informed that he was suffering from an allergy, as his physicians thought the nasal drainage was related to the allergy.

Subsequent to the cabinet door incident, Mr. Nivens lost no work time, he did not show any surface manifestations (e.g., blood) nor did he seek medical attention. Other than the drainage of the clear fluid from his nostrils, there was no symptom of which he knew following the cabinet door incident. Even at the time he saw one Dr. Cohen, which was almost one year later, he did not "connect up" the cabinet door incident with the drainage from his nostrils.

While he did not suffer a swelling at the point of the blow, he did experience something he described as "thickened skin" that one could "feel more than you could see." More than a year after the accident, he was hospitalized by one Dr. Richard Levy, a neurosurgeon, for the purpose of determining the etiology of the nasal discharge. At this time he mentioned the "thickened skin" to the physician. This, however, was in connection with two other blemishes about his body which he thought he should check since he was in the hospital and the opportunity had arisen. When asked by the physician the source of the thickened skin, he related the cabinet door incident.

He underwent a craniotomy to repair a hairline crack at the base of the skull which allowed the clear spinal fluid to drain through his nostrils. This operation had to be redone. He suffered brain damage and was seriously disabled at the time of the trial.

The case was submitted to the jury in the District Court for the Eastern District of Louisiana on a special interrogatory with regard to Signal's defense of prescription. The interrogatory read as follows:

> "Did the plaintiff bring this suit within one year of the date he knew, or by the exercise of reasonable care, should have known that he had *sustained* damages resulting from the alleged accident?"

The jury's answer was — "Yes." At the same time a general verdict was submitted and the jury held in favor of Nivens. Post-trial motions were filed, argued, and acted upon. Upon appeal, the Court of Appeals reversed the District Court, and held, as outlined. Supra. The Court subsequently denied petitioner's petition for rehearing.

Jurisdiction was based in the District Court on the Outer Continental Shelf Lands Act (43 U.S.C. Sec. 1331. et seq.)

REASONS FOR GRANTING WRIT

The Federal Trial Court, in an Outer Continental Shelf case, is not just an "Erie" court of the state in which it sits; rather, it is the Court to which Congress has committed exclusive jurisdiction, for enforcement of all Federal laws, including those adopted from the adjacent state as surrogate law. It is a Federal Court adjudicating a Federal case controlled by direct or adoptive Federal law. See *Huson v. Chevron Oil Co.*, C.A. La. 1970, 430 F. 2d 27, Affirmed, 92 S. Ct. 349.

404 U.S. 97, 30 L. Ed. 2d 296. Quoting from the *Huson* opinion:

> "We hold, however, that the 'prescriptive' nature of Article 3536 does not undercut its applicability under the Lands Act. Under Section 1333 (a)(2) of the Act, '(s)tate law bec(omes) Federal law Federally enforced.' *Rodrigue v. Aetna Casualty & Surety Co., Supra*, at 365, 23 L. Ed. 2d at 370. It was the intent of Congress, expressed in the Senate Committee Report, in the conference report, and on the floor of the Senate that State laws be 'adopted' or 'enacted' *as Federal law*. id., at 357, 358, 23 L. Ed. 2d at 365. Thus, a Federal court applying Louisiana law under Section 1333 (a)(2) of the Lands Act *is applying it as Federal law — as the law of the Federal forum.*" (Last emphasis added) 404 U.S. 197, 102, 30 L. Ed. 2d 296, 303, 92 S. Ct. 349.

Since the instant lawsuit was brought under the Outer Continental Shelf Lands Act in a Federal forum, the Seventh Amendment of the United States Constitution guarantees petitioner's right to a trial by jury. That this right is an important, if not sacred, right guaranteed by our Constitution, was made clear by this Court many years ago in *Parsons v. Bedford, Breedlove and Robeson*, 3 Pet. 433, 28 U.S. 433, 7 L. Ed. 732 (1830). In that case, Mr. Justice Story, speaking for the Court, considered the supremacy of the Seventh Amendment over the Conformity Act of 1824 as applied to Louisiana. Quoting from the opinion:

> " 'No fact, tried by a jury, shall be otherwise re-examinable, in any court of the United States, than according to the rules of common law.' This is a prohibition to the courts of the United States to re-examine any facts tried by a jury, in any other manner.
>
> * * * *
>
> "Was it the intention of Congress, by the general language of the Act of 1824 to alter the appellate jurisdiction of this court, and to confer on it the power of granting a new trial, by reexamination of the facts tried by the jury? To enable it, after trial by jury, to do that in respect to the courts of the United States, sitting in Louisiana, which is denied to such courts sitting in all other states in the Union? We think not. No general words, purporting only to regulate the practice of a particular court, to conform its modes of proceeding to those prescribed by the state to its own courts ought, in our judgment, to receive an interpretation, which would create so important an alteration in the laws of the United States, securing the trial by jury. Specially, ought it not to receive such an interpretation, when there is a power given to the inferior court itself to prevent any discrepancy between the state laws and the laws of the United States; so that it would be left to its sole discretion to supercede, or to give conclusive effect in the appellate court to the verdict of the jury.
>
> * * * *

"The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into and secured in every state constitution in the union; and it is found in the constitution of Louisiana. One of the strongest objections originally taken against the Constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the constitution was adopted, this right was secured by the Seventh Amendment of the Constitution proposed by Congress; and which received an assent of the people, so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people. This amendment declares that 'in suits of common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved; and no fact, once tried by a jury shall be otherwise re-examinable in any court of the United States, than according to the rules of the common law.' " 3 Pet. 445, 447, 448, 28 U.S., 445, 448, 7 L. Ed. 732.

This Honorable Court has long held that neither the Courts of Appeal nor this Court can redetermine facts found by the jury. Quoting from *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U.S. 355, 82 S. Ct. 780, 7 L. Ed. 2d 798, (1962):

"We might agree with the Court of Appeals had the questions of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'No fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.' " 369 U.S. 356, 358, 82 S. Ct. 780, 783, 7 L. Ed. 2d 798.

Similarly, in *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525, 78 S. Ct. 893, 2 L. Ed. 2d 953, (1958), this Court refused to allow state law to divest a Federal jury of its normal function, thereby once again affirming the constitutional guarantee to a trial by jury in the Federal Courts. Quoting from the opinion:

"Thus, the inquiry here is whether the Federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the Federal Court and another way in the state court.

"We think that in circumstances of this kind the Federal court should not follow the state rule. It cannot be gainsaid *that there is a strong Federal policy against allowing state rules to disrupt a judge-jury relationship in the Federal courts.*" (Emphasis added). 365 U.S. at 538, 78 S. Ct. at 901.

Although the Court of Appeals specifically disregarded Signal's argument that under Louisiana or Federal practice, the judge may never submit to the jury the question of prescription but must decide it himself (See 520 F. 2d 1019, 1022, N. 4), any argument that Louisiana practice allows the judge to decide such a fact question is directly inapposite to the holding in *Byrd, Supra.*

That the instant case involved a question of fact to be decided by the jury is clear, and the Court of Appeals' reversal of the jury's finding is clearly prejudicial error. Quoting from *Gulf, Colorado & Santa Fe Railway Co. v. McClelland*, 355 F. 2d 196 (5 Cir. 1966):

> "We think it clear that on the record before the court it was incumbent upon the trial court to submit this issue *of the statute of limitations to the jury for its resolution.* It was prejudicial error for the court not to do so, and the judgment must be reversed for resubmission of this issue to the jury. We leave it to the discretion of the trial court to determine whether the entire case shall be submitted or only the issue of limitation." (emphasis added) 355 F.2d 196, 198.

In so holding, the court, in *McClelland*, adopted the standard announced by this Court in *Urie v. Thompson*, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949). That is, that an employee, is only "injured" under the F.E.L.A. (45 USCA Section § 51) when the accumulated effects of the deleterious substance manifest themselves to the employee, and such a determination is a jury question. Similarly, under Louisiana law, the Federal court in the Eastern District of Louisiana is

obliged to apply the Louisiana doctrine known as "*contra non valentum agere nulla curit prescraescriptio,*" which means that prescription does not run against a person who could not bring his suit. In interpreting the doctrine of "contra non," Louisiana courts not only have never held that such a determination is a matter of law, but rather, those courts have held that prescription under such circumstances is a factual question to be determined as any other fact.

Louisiana jurisprudence, announced by the Supreme Court of the state of Louisiana, has formulated a standard to determine how the "contra non" doctrine is to be applied. In *Cartwright v. Chrysler Corporation*, 255 La. 598, 232 So.2d 285, (1970), the court noted:

> "*Whatever is notice enough* to excite attention, put the owner on his guard, and call for inquiry is tantamount to knowledge or notice of everything to which inquiry may lead, and such information or knowledge as ought to reasonably put the owner on inquiry is sufficient to start the running of prescription." (Emphasis added) 232 So. 2d 285, 287.

As noted above, in interpreting whatever is "notice enough" to start the running of prescription under the *Cartwright* doctrine, Louisiana courts have held that the determination is a factual issue.

In *Babineaux v. Pernie-Bailey Drilling Co.*, 261 La. 1080, 262 So. 2d 328 (1972), the court held as follows:

"We have reviewed the trial court's record and are in agreement with that court's *factual determination*, affirmed by the Court of Appeals." (Emphasis added) 262 So. 2d 328, 335.

Similarly, in *Lucas v. Commercial Union Ins. Co.*, 198 So. 2d 560 (1967), the court held as follows:

"The issue in cases of this nature is purely one of *fact* . . . ." (Emphasis added) 198 So. 2d 560, 565.

Finally, in *Steele v. Aetna Life & Casualty Co.*, 304 So. 2d 861, (La. App. 1974), the court held:

"*The factual determination* that the cause of action manifested itself with sufficient certainty to be susceptible of proof by that date is well documented in the record. There is no manifest error in that holding." (Emphasis added). 304 So. 2d 861, 864.

The Court of Appeals, however, held that those manifestations that Mr. Nivens described as no more significant than the "mashing" of a finger, were all that was required, *as a matter of law* to meet the test of "whatever is notice enough . . ."

The jury was charged on the law expressed in *Cartwright* as well as other pertinent Louisiana cases and it decided that Nivens brought his suit within one year of the date that he knew, or by the exercise of reasonable care, should have known that he had *sustained* damages resulting from the alleged accident. The decision rendered by the Fifth Circuit,

however, effectively denies Mr. Nivens a right to a trial by jury on that issue. It held, applying the standard of *Boeing v. Shipman*, 411 F. 2d 365, (5 Cir. 1969), that the District Court should have held, as a matter of law, that those manifestations of which Mr. Nivens was aware (i.e., the bump, red spot, and the four-hour headache) constituted "sustained damage" to support a lawsuit. No Louisiana court has ever substituted its judgment for that of the fact-finder on this issue and as can be seen from the special interrogatory submitted to the jury, the jury determined that Mr. Nivens had not "sustained damage."

One wonders whether the Court of Appeals for the Fifth Circuit, by holding that the District Court was so obliged, as a matter of law, considered the total effect of all of Mr. Nivens manifestations. Query whether the District Court would have been so obliged if Mr. Nivens had only one of the symptoms, say, the four-hour headache. Query whether that single symptom, as a matter of law, would have triggered the running of prescription or would a jury have been called upon to decide whether or not a four-hour headache alone was "whatever is notice enough . . ."

If what the Court of Appeals has held in its opinion of October 8 is that the Federal District judge must weigh all of the symptoms and determine if there is enough to constitute notice, the obligation to determine facts would be imposed upon the judge, when, as a matter of constitutional law, that obligation rests with the jury.

If, on the other hand, the Court of Appeals did not make a factual finding, it would appear to be holding

that in an action brought under the Outer Continental Shelf Lands Act, *each and every* manifestation of injury, no matter how insignificant, casual, or trivial, triggers the running of prescription. If this is the case, we do not believe that the court has properly "adopted" the law of Louisiana as mandated by *Chevron Oil Co. v. Huson, Supra*. No Louisiana court has ever so held, or for that matter, rendered an opinion which can be interpreted so as to hold. All any Louisiana appellate court has ever held is that, on the facts of the particular case presented to it, the District Court had sufficient grounds to uphold its *factual determination* that prescription had run.

The Court of Appeals did recognize that there is an area of factual determination within the province of the jury. Quoting from the opinion:

> "Obviously, there can be a tortious impact with a total absence of manifestations tending to show damage. Presumably, there is room for a *de minimus* concept, where there has been tortious impact, but such *inconsequential manifestation that a reasonable person would not consider he was either injured, or that it was appropriate to make inquiry.*" (Emphasis added) 520 F. 2d 1019, 1024.

If the decision of October 8, 1975 is to stand, it would appear that it is virtually impossible to fit into the category of *de minimus* outlined by the Fifth Circuit. It is petitioner's position that it is the province of the jury to decide whether there are "inconsequential manifestations" which would not constitute the

"whatever is notice enough ...." standard of *Cartwright, Supra*. It is also his position that the symptoms which Mr. Nivens manifested subsequent to the cabinet door incident were inconsequential and that Mr. Nivens is and was entitled to a Seventh Amendment jury decision for such a determination, and that the jury decision was rendered in his favor.

The Court of Appeals might have been justified in holding that, as a matter of law, Mr. Nivens knew that he had "sustained damage" at the time of the accident, had he been disabled, sought medical attention, or even medication. However, if there is an area between "inconsequential manifestations" and "consequential manifestations" in which the decision can be of a borderline nature, Mr. Nivens is entitled to Seventh Amendment protection on that issue. In addition, it is hard to imagine how the Court of Appeals can hold that the jury in the District Court was unreasonable in holding that Mr. Nivens' known injury resulting from bumping his head on a cabinet door was not sufficient to place him on notice, or was not sufficient to charge him with knowing that he had "sustained damages."

Whether the jury was reasonable or unreasonable is quite important herein, because, under the decision rendered in *Boeing, Supra*, the standard which the Court of Appeals held applied to the instant case, the court must find that reasonable men could come to no other conclusion than that those injuries of which Mr. Nivens was charged to have knowledge constituted sufficient notice that he had "sustained damages." However, under the *Boeing* decision, the court must decide all inferences in favor of Mr. Nivens. Accepting

all the inferences in Mr. Nivens' favor, it is submitted that the jury was anything but unreasonable.

Petitioner suggests that, under the Seventh Amendment, he is entitled to urge to a jury that the symptoms of which he knew were not "notice enough" within the meaning of *Cartwright v. Chrysler, Supra*, or were not "sustained damages" within the meaning of *Jones v. Texas & Pacific Railway Co.*, 125 La. 542, 51 So. 582, (1910). Rather, said symptoms were what the Court of Appeals described as "such inconsequential manifestations that a reasonable person would not consider he was either injured or that it was appropriate to make inquiry."

The inquiry that Mr. Nivens did make was due to the drainage of nostrils which he did not relate to the bump on his head, and which did not start on the day of the accident. The Court of Appeals did not comment on one of the points raised in Mr. Nivens appellate brief. That is, even though the Louisiana appellate courts review both the law and the facts, in every case where the plea of prescription was sustained by those appellate courts, they were affirming a District Court decision. Those decisions could all have been, and Mr. Nivens respectfully suggests that they were, factual decisions. Except in those cases wherein the court specifically said that questions of fact were being determined, they were silent upon that point. Petitioner submits that the most that can be said about any of the Louisiana cases which affirm the trial court's dismissal on the grounds of prescription, is that the District Court had not committed manifest error because there was sufficient evidence in each case to support the District Court's factual determination.

No Louisiana court has ever held that the evidence, as a matter of law, required the District Court to render the decision it had on the plea of prescription. Therefore, the Court of Appeals has taken it upon itself to do something no Louisiana appellate court has ever done, to-wit: reverse the fact-finder in its determination that a matter has not prescribed. In addition, it must be noted that Louisiana appellate courts have greater license to review decisions of fact because they are empowered, by the state constitution, to review such findings. Quoting from *Wright v. Paramount Pictures*, 198 F. 2d. 303, (5 Cir. 1952):

> "Federal courts are forbidden by the Seventh Amendment to re-examine any fact tried by a jury otherwise than according to the rules of the common law, while Louisiana state courts, as precedents, have the difficult tasks of separating the decisions of Louisiana courts on the law from their review of the facts." 198 F. 2d. 303, 306.

The tone of its opinion suggests that perhaps the Court of Appeals did not believe Mr. Nivens' position that the symptoms developing after the accident were not connected in his mind to the blow on the head. He described his injury as a "hard lick," a "bump" and, in addition, as no more significant than the mashing of a finger. If *Boeing v. Shipman, Supra*, is to be followed, it is not for any court to decide any inferences against Mr. Nivens, but rather, said inferences must be decided in his favor. In its opinion of October 8, the Court of Appeals said that the broad language of *Jones v. Texas & Pacific Railway Co., Supra*, might appear to give

comfort to Mr. Nivens. The court then goes on to distinguish *Jones* as a property damage claim involving injury and the subsequent death of a mule. This, the court distinguished from a personal injury claim such as is presented by the instant case. However, in *Lucas, Supra*, the court held otherwise. Quoting from the opinion:

> "We see no valid reason for differentiating between claims of tort predicated upon whether they involve personal injuries or damages to property. Just as in *Jones v. Pacific & Railway Co.*, a claim for damages to personal property is said not to arise during the delay intervening between the tortious act and the accruance of the damage, *the same reasoning should apply in the case of a plaintiff suing for injuries to his person.*" (Emphasis added) 198 So. 2d 560, 565.

It should be noted that, in *Jones, Supra*, the Supreme Court of the state of Louisiana held that claims for the temporary use and expenses of treatment had prescribed, but the claim for the death of the mule, which occurred within one year of the date of the filing of the suit, had not prescribed. Petitioner is not suggesting, as the Court of Appeals for the Fifth Circuit has suggested, that damages can be bifurcated. Rather, what petitioner suggests is that the Louisiana Supreme Court and the *Lucas* court felt that the claim for temporary loss of the use and expenses of treatment of the mule were so insignificant that they were, as the *Jones* court said, *uncertain, contingent, speculative, inchoate*, and so long as they remained in

that category, did not give rise to a cause of action. If, in *Jones*, temporary loss of use and expenses for treatment of the mule were not damages "sustained" as a matter of law, it is hard to imagine how Mr. Nivens, who needed no medical treatment, no loss of time from work, not even a bandaid, could have "sustained damages" as a matter of law.

Let us further examine the *Lucas* decision and some of its language upon which the Court of Appeals relied in its opinion so as to examine the underlying facts of that case. The defendant's claim in that case was that the suit had prescribed because of the allegations made by the plaintiff in Article 10 of his petition. Quoting from the petition:

> "Upon going to a physician for a routine checkup on June 2, 1965, plaintiff discovered that he had been caused to suffer a sore, tender neck, numbness in the right thumb, and slight sitffness in the lumbro-sacral area, as a result of the accident. These symptoms lasted for about a month. Soon after this pain had disappeared, petitioner suffered severe thoracic pains and went to see Dr. Richard W. Ernst, a cardiovascular and thoracic surgeon from Fort Worth, Texas, and there underwent an operation for the relief of a right thoracic outlet syndrome. Plaintiff had no idea that he had any *thoracic* injury until three or four months after the accident. According to the medical reports of Dr. Ernst, the right thoracic outlet syndrome was proximately caused by the original injury sustained as a result of the

> May 20, 1965 accident, that as a matter of fact, the thoracic outlet syndrome cannot be brought on as such by a car accident resulting in neck or shoulder injuries . . ." (Emphasis supplied).

Clearly, Lucas suffered a sore, tender neck, numbness of the right thumb, and slight stiffness in the lumbosacral area as a result of the accident. These symptoms lasted for a month, and Lucas was well aware of them. Certainly a sore, tender neck, numbness of the right thumb and slight stiffness in the lumbosacral area were symptoms the patient related to the doctor, and not what the doctor related to the patient. The Louisiana appellate court did not hold that these symptoms, as a matter of law, started the prescription clock. On the contrary, the District Court was held to be guilty of "manifest error" for maintaining pleas of prescription.

Finally, petitioner submits that the Court of Appeals in its opinion, indicates a certain uneasiness with its own decision. That is, quoting from the opinion:

> "Nivens case has considerable emotional appeal, and in a legal sense, superficial appeal. A finder of fact could conclude that, like Nivens, a *reasonable person*, aware of the nasal drainage, would not have related it to the bump on the head. Fortuitously, and despite his lack of awareness, *Nivens made the kind of inquiry the statute of limitations contemplates*. The result of his inquiry, to several

> doctors, none of whom were told of the trauma, was that none found the hairline fracture until too late. Thus, for more than a year, with respect to this injury, *Nivens's action vindicated the policies of the statute.*" (Emphasis added) 520 F. 2d 1019, 1026.

It is quite difficult to understand how the quoted language, in light of the court's apparent reliance on *R, J. Reynolds Tobacco Co. v. Hudson*, 314 F. 2d 776 (5 Cir. 1963), can be reconciled with Louisiana principles with respect to the commencement of prescription as announced in *Reynolds* by Judge Wisdom, a long time practicing attorney in Louisiana. Quoting from the opinion of the Court of Appeals:

> "He (Judge Wisdom) pointed out that the Code's focus is on when damage is 'sustained' rather than the day of the accident, causing the damage, and that by judicial construction, *prescription runs from the time a plaintiff 'knows or should know he has sustained damages.' Reynolds* held, in its factual context, and as a logical and necessary extension of the foregoing principle, that to start the running of prescription, a plaintiff is required to have *'knowledge of the relationship between the effect and the damage sustained.'* " (Emphasis added) 520 F. 2d 1019, 1022.

On the one hand, the Court of Appeals asserts that Mr. Nivens made the kind of inquiry the statute of limitation contemplates; that his actions vindicated the policies of the statute; and that a finder of fact could

conclude that Nivens, as a *reasonable person*, would not have concluded that the nasal drainage was related to the bump on the head. On the other hand, the Court of Appeals, relying on *Reynolds*, apparently believes that prescription ran against Mr. Nivens because he knew or should have known that he had "sustained damage" and that Mr. Nivens had "knowledge of the relationship between the offense and the damages sustained." However, the jury in the District Court found otherwise, and the Court of Appeals, without any basis in law, has reversed that finding.

The decision as to whether or not a plaintiff has vindicated the policies of the statute, whether or not he has made the kind of inquiry the statute of limitations contemplates, and whether or not he has acted as a reasonable person is within the province of the jury, and that right is guaranteed by the Seventh Amendment. Petitioner submits that, if the decision of October 8, 1975 is to stand, it is difficult to imagine a case or a set of circumstances in which an appellate court could not, simply by declaring any aspect of a lawsuit a "matter of law" emasculate the function, purpose and obligations of a jury as guaranteed by the Seventh Amendment of the United States Constitution.

CONCLUSION

The jury's verdict in favor of Mr. Nivens was entirely reasonable, proper, and indeed, mandated by the law and the evidence. The Court of Appeals for the Fifth Circuit erred in holding that petitioner's cause of action prescribed as a matter of law.

PROOF OF SERVICE

I, Donald V. Organ, a member of the bar of the Supreme Court of the United States, hereby certify on this day that I have served copies of the foregoing application for writs on:

Mr. Fred Salley
225 Baronne Street
New Orleans, Louisiana 70112

Mr. Geoffrey Longnecker
704 Carondelet Street
New Orleans, Louisiana 70130

Mr. James L. Bates, Jr.
230 Loyola Avenue
New Orleans, Louisiana 70112

DONALD V. ORGAN
427 Gravier Street
New Orleans, Louisiana 70130
(504) 581-3908

MICHAEL D. MEYER
On the Brief

APPENDIX "A"

Albert L. NIVENS, Plaintiff-Appellee,

versus

SIGNAL OIL & GAS CO., INC.,
Defendant Third-Party
Plaintiff-Appellant,

LOUISIANA OFFSHORE CATERERS,
INC., Third-Party Defendant-Appellee,

Travelers Insurance Company,
Intervenor-Appellant.

No. 74-2206.

United States Court of Appeals,
Fifth Circuit.

Oct. 8, 1975

Appeals from the United States District Court for the Eastern District of Louisiana.

Before GODBOLD, Circuit Judge, SKELTON, Associate Judge,* and GEE, Circuit Judge.

GODBOLD, Circuit Judge:

---

* Of the U.S. Court of Claims, sitting by designation.

On July 10, 1971, appellee Albert Nivens was working as a cook aboard the stationary platform of appellant Signal Oil & Gas Company on the continental shelf in the Gulf of Mexico. He was employed by third party-appellee Louisiana Offshore Caterers, Inc. Cabinet doors located in the galley above where Nivens was working were defective and would come open without warning. While Nivens was carrying out his duties he struck his head on the bottom corner of one of those doors which had come open. More than a year later, September 22, 1972, he filed suit against Signal for injuries allegedly resulting from this occurrence.

At trial the evidence showed that immediately upon impact it was revealed that Nivens had suffered injuries that appeared to be relatively minor in nature. Also, beginning a few days later and continuing for more than a year, he suffered manifestations of an abnormal condition that he did not consider to be related to the accident and that were not diagnosed by doctors as traumatic in origin but after the expiration of a year were found to be symptomatic of substantial injury.

The principal question raised on appeal is whether as a matter of law plaintiff's action was prescribed under Louisiana law, LSA-C.C. Art. 3537, which provides that the one year statute of limitations for tort actions begins running when the "damage [was] sustained."[1] The courts submitted to the jury Signal's defense of prescription, by this special interrogatory:

1 The federal courts have jurisdiction of the action under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 et seq. The Act provides that state law shall apply. 43 U.S.C. § 1333(a)(2).

> Did the plaintiff bring this suit within one year of the date he knew or, by the exercise of reasonable care, should have known that he had sustained damages resulting from the alleged accident?

to which the jury answered "Yes." The jury found for Nivens on the merits, and awarded $175,000 in damages.[2] We conclude that as a matter of law Nivens' claim had prescribed, and the case is reversed.

The cabinet door struck Nivens between his eyes and above the bridge of the nose. Vidrine, his assistant, standing about two feet away, described the noise of the contact as loud and stated that Nivens hit himself "real hard" on the cabinet. Nivens variously described the impact as a "hard lick," a "bump," and as no more significant than mashing a finger. Nivens stepped or fell backwards and was caught by Vidrine. Long afterwards Nivens told one of his doctors that he was "momentarily dazed." He displayed anger over the occurrence and complained generally to his coworkers of the incident and of the pain it caused him. Vidrine described these complaints this way: "He said how his head hurt and how he hit it hard; how much it hurts."

Slight swelling and a red spot appeared at the point of impact immediately, although the skin was not broken. Nivens experienced immediate pain and headache which continued for three to four hours. Signal's superintendent on the job testified with respect to a time soon after the accident:

2 The third party claim was tried to the court which found for third party-defendant Louisiana Offshore.

A. I was in the bunkhouse and Mr. Nivens came in the bunkhouse and he was very upset and he was holding his head and I asked what had happened. He walked on back to his bunkroom and sat down.

Q. He said what?

A. He just said he bumped his head at that time.

Q. Did he say what he bumped his head on or not?

A. Cabinet door.

Q. And what was he doing with his hand, if anything?

A. He was holding his forehead, rubbing his head.

The foregoing are the immediate consequences. Less immediately but at a time not specifically identified Nivens began complaining to Vidrine about "bad headaches," stating that his head "hurt a lot." Vidrine noticed a change in Nivens' demeanor. Contrary to his usual manner Nivens had no patience with the men he was feeding or with his co-workers. The superintendent described another occasion, not fixed as to time, when Nivens came into the bunkhouse and laid down with his hand over his head. The superintendent inquired what was the matter and Nivens complained of feeling unwell and dizzy.

Meanwhile, commencing within two days to a week after the accident, Nivens became subject to frequent, and at times heavy, drainage of clear fluid from his nose. The drainage was heaviest at night. Vidrine observed that Nivens' pillow was wet from the drainage. Vidrine's opinion was that the headaches

and the heavy drainage evidenced by the wetting of the pillow were serious, and he advised Nivens to see a doctor.

Nivens described his general reaction this way:

> The blow to my forehead caused a bump. It did not break the skin. It was painful but it did not cause me to loose [sic] any time from work or seek medical attention. I did not believe at that time that I received any serious injury from that blow.

At the time of the incident and for three months preceding Nivens had been under the care of Dr. Hagen for an inner ear disorder, one of the consequences of which was drainage of a yellowish discharge from one ear. Nivens complained to Dr. Hagen of the nasal drainage and even displayed to him a stained pillowcase evidencing its volume. In August Dr. Hagen referred Nivens to an allergy specialist who noted a prior history of prolonged and severe disease of the inner ear and with respect to the nasal drainage made a tentative diagnosis of allergy. This was not, however, substantiated by tests, and he began treatment directed at the inner ear condition. Nivens became dissatisfied and terminated this relationship in November but continued under the care of Dr. Hagen.

The slight swelling in the forehead remained, and during the year after the accident it became firm or "gristly" to the touch. A doctor who observed it slightly more than a year after the injury described it as "a firm small swelling in the middle of the forehead, approximately 1 cm. in diameter." It was still there at the time of trial.

In early June 1972 Dr. Hagen referred Nivens to another allergist. Nivens told this doctor that he considered his condition allergic. Tests, followed by a second test to be "double sure," were negative. Around June 12 the allergist told Nivens in positive and emphatic terms that he had no allergy and that he should dismiss allergy from his mind.[3]

Finally, in late June or early July 1972, Nivens was referred to a group of nose specialists who in turn called in a neurosurgeon. Nivens was hospitalized in July to try to determine the etiology of the nasal discharge. Concerned that the place on his forehead and two other skin blemishes on his body might be malignant, Nivens mentioned them to the surgeon. When asked the source of the thickened skin he related the incident concerning the cabinet door. A prompt medical test quickly revealed that the fluid discharging through the nasal passages was spinal fluid draining into the nasal cavity through a hairline fracture in the base of the skull, ⅜ to ½ inch long. This diagnosis was made on or about July 18, and in any event after more than a year had elapsed. There is no substantial evidence suggesting that the fracture originated from a cause other than the impact with the door.

3 Nivens' position is that until more than a year elapsed he never related to any medical practitioner the occurrence of July 11, 1971. That correctly states the evidence that went to the jury. Whether during the year doctors asked him if he had suffered a blow on the head is not clear. While we do not rely upon it because we are unsure whether it was introduced in evidence, plaintiff's counsel quoted in a brief to the trial court Nivens' statement made in a deposition to the effect that the doctors would keep asking him if he had been hit on the head and he would tell them he had not, and, reminded that actually he had been hit on the head, his response was: "I was thinking I wasn't hit on the head, you understand."

Surgery was performed July 31, primarily to cut off the route by which the fluid was draining because its presence threatened to permit the entrance of bacteria causing meningitis. The nasal drainage route was successfully closed. Suit was filed September 22. A second operation was later required to close off drainage through the place where the surgeon entered the skull.

Long after the surgery the neurosurgeon noticed adverse psychological symptoms, including anxiety, impaired memory and muscle tremors. He referred Nivens to a psychologist for testing. Both concluded that probably Nivens was suffering organic brain damage. The evidence is that the blow on the head and the subsequent corrective surgery could not have caused the kind of brain damage from which Nivens now suffers but could have enhanced a pre-existing brain disorder. As an unavoidable result of the brain surgery Nivens also suffered permanent loss of his sense of smell, and thus impairment of his sense of taste.

We agree with Signal that under the evidence, applying the standard of *Boeing v. Shipman*, 411 F.2d 365 (CA5, 1969, en banc), Nivens' claim had prescribed and the court should have granted Signal's motion for a directed verdict.[4] In *R. J. Reynolds Tobacco Co. v. Hudson*, 314 F.2d 776 (CA5, 1963), Judge Wisdom, a longtime practicing attorney in Louisiana, discussed for this court Louisiana principles concerning the commencement of prescription. He pointed out that

4 This conclusion pretermits decision of Signal's argument that under Louisiana practice, and even in a federal court, the judge may never submit to the jury the question of prescription but must decide it himself.

the Code's focus is on when damage is "sustained" rather than the day of the act causing the damage, and that by judicial construction prescription runs from the time a plaintiff "knows or should know he has sustained damages." *Reynolds* held, in its factual context and as a logical and necessary extension of the foregoing principle, that to start the running of prescription plaintiff was required to have "knowledge of the relationship between the offense and damages sustained." *Id.* at 780.

In *Lucas v. Commercial Union Insurance Co.*, 198 So.2d 560, 563-64 (La. App., 1967), the court discussed the triggering of prescription in varying situations:

> With respect to actions for recovery for personal injuries, when the injury is immediately apparent, that is, when evidence or symptoms thereof are manifest simultaneously with the occurrence of the tort, no problem is encountered in determining the commencement date of prescription. In such instances prescription commences as of the date of the wrongful act. *Marquette Casualty Company v. Brown*, supra. Even though the full extent of the damage or loss may not be immediately ascertainable, nevertheless, if the aggrieved party is aware of claim resulting from the tortuous [sic] conduct, the entire claim, including that for damages not then determinable, prescribes in one year from the date of commission of the wrong. *Marquette Casualty Company v. Brown*, supra; *Luke v. Caddo Transfer & Warehouse Co.*, 11 La.App. 657, 123 So. 444, 124 So. 625. In such instances, the cause of action is deemed to have arisen immediately, therefore prescription runs from the date of commission of the tort.

> It is those instances wherein the personal injury does not arise immediately; or is not apparent conjointly with the commission of the tort, that serious problems are encountered in determining the date on which prescription commences.

In *Cartwright v. Chrysler Corporation*, 255 La. 598, 232 So.2d 285 at 287 (1970), the test was phrased this way:

> Whatever is notice enough to excite attention and put the owner on his guard and call for inquiry is tantamount to knowledge or notice of every thing to which inquiry may lead and such information or knowledge as ought to reasonably put the owner on inquiry is sufficient to start the running of prescription. (footnote omitted)

In *Hunter v. Sisters of Charity*, 236 So.2d 565 (La.App., 1970), the test was stated as whether the circumstances were "sufficient to excite plaintiff's attention, put her on guard and call for an inquiry."

Louisiana plaintiffs have sought unsuccessfully to escape the principle of these cases in several ways. In *Luke v. Caddo Transfer & Warehouse Co.*, 11 La. App. 657, 124 So. 625 (1929), the claimant suffered immediate, severe and numerous injuries. He was confined to bed for 90 days and claimed to be permanently disabled. He sought to escape the bar of prescription by arguments that the period did not commence until he could definitely determine the results of his injuries, such as the length of hospital confinement and of disability, the duration of his pain and suffering,

and the amount of his medical expenses. Alternatively he contended that the prescriptive period was not triggered until he knew that he would not die. The court swept away these arguments, pointing out: "plaintiff was damaged the moment the brick post and wall fell upon him. He was instantly injured and instantly damaged." * * * When the brick wall fell upon him, he was injured and instantly damaged, and his cause of action arose the moment he was damaged. The falling of the bricks upon him crushed his body and produced personal injuries." *Id.* at 626.

In *Christian v. Daniell Battery Manufacturing Co., Inc.*, 279 So.2d 214 (La. App., 1973), the court rejected plaintiff's argument that the prescriptive period began to run only when his revealed injuries were known to be permanent. The plaintiff in *Cartwright, supra*, sued the driver of an automobile which rear-ended her when she was stopped at an intersection. The suit was dismissed on the ground that the accident was unavoidable because the brakes on defendant's car suddenly failed. Plaintiff then sued Chrysler, the manufacturer, charging that the brakes were defective. The court rejected plaintiff's theory that prescription should commence only when she became apprised of the real cause of the accident — the defective brakes (and, inferentially, apprised of the identity of the defendant allegedly responsible for that cause.) *Hunter, supra*, is a similar case. Plaintiff, a hospital patient, fainted and was lifted bodily by hospital employees and placed on her bed. She immediately began complaining of her injuries. Without success she contended that prescription began only when she became aware from medical opinion that the cause of

her alleged injuries could have been the negligence of hospital employees in lifting her and placing her in the bed.[5]

Thus, Louisiana has rejected efforts to postpone the beginning of the prescriptive period until the results of injuries are known and amounts of losses can be ascertained (*Luke*), until permanency of injury is known (*Christian*), until the originating cause of the incident and the defendant responsible for that cause can be identified (*Cartwright* and *Hunter*). *Reynolds* allowed postponement until there is knowledge of the relationship between offense and damage sustained.

In this case Nivens knew of the incident and, pretermitting the crack in the skull and the nasal drainage as a manifestation of abnormality, he knew that his injuries were from an identified cause by an identifiable defendant. He suffered pain, dizziness and nausea, headache — effects sufficient to require him to lie down in his bunk for relief — a red spot and a slight swelling which did not disappear, a firm, gristly place

---

5 *See also: Duhon v. LaFayette General Hospital*, 286 So.2d 166 (La. App., 1973). Plaintiff sued doctors alleging malpractice in treatment and a hospital to which he subsequently was admitted, charging negligence in permitting him to fall from his bed. Presumably he claimed delay in knowing that his alleged injuries could have related to the fall from bed. The court affirmed a dismissal on grounds of prescription, saying:

> [W]e agree with the trial judge "that circumstances indicate that plaintiff had a basis for believing that perhaps he had been injured in the fall on December 16, 1969." Plaintiff and his wife testified that his wife was in the room when plaintiff fell and that she informed him of his fall a couple of days later. Also, Dr. Rivet informed plaintiff a second operation was needed to repair damage which could have been caused by plaintiff in his fall from bed. Plaintiff had sufficient facts to incite his attention and put him on guard and call for inquiry. *Cartwright v. Chrysler Corporation*, supra.

Id. at 170.

on his skin that caused him concern that it might be malignant. These manifestations of injury and injuries actually known were in every sense "sustained" under the Louisiana statute as construed. The effort to postpone the beginning of prescription must fail. The arguments that Nivens could have found no lawyer to file in federal court a claim for these damages, and that if filed such a suit might well have been dismissed on grounds of *de minimis*, are little better than frivolous. These are not the tests for whether damages have been sustained.

Obviously there can be a tortious impact but a total absence of manifestations tending to show damages.[6] Presumably there is room for a *de minimis* concept where there has been tortious impact but such inconsequential manifestations that a reasonable person would not consider he was either injured or that it was appropriate to make inquiry. This is not such a case. A jury might find that, pretermitting the skull fracture and drainage, Nivens did not consider his injuries serious or meriting his retaining a lawyer and filing suit. But they were injuries in a legally significant sense and were "sustained." Courts are regularly trying, and appellate courts regularly reviewing, numberless cases where the injuries are no greater.[7]

6 See the discussion, *infra*, of *Lucas*, which draws the line between asymptomatic and symptomatic conditions.

7 Injuries similar to those sustained by Nivens have been held compensable under Louisiana law. *See Janice v. Whitley*, 111 So.2d 852 (La. App. 1959) (mild cerebral concussion causing slight headaches for four months); *Ulmer v. Travelers Ins. Co.*, 156 So.2d 98 (La. App. 1963) (contusion and small hematoma); *Augello v. Call*, 210 So.2d 129 (La. App. 1968) (slight blow to head and anxiety reaction); *Strother v. State Farm Mut. Auto Ins. Co.*, 238 So.2d 774 (La. App. 1970) (contusion of forehead); *Dickson v. Zurich Ins. Co.*, 261 So.2d 350 (La. App. 1972) (bump on head). *See also* federal cases where personal injury claims, made in good faith, have withstood

The facts mandate the result that must be reached. Nivens' claim had prescribed, not partially but in its entirety. He implicitly suggests that even if the earlier and revealed injuries were sufficient to trigger a prescriptive period, we should bifurcate the injuries caused by the single trauma and treat the later-found and more serious injury as the subject of another and delayed prescriptive period. This we cannot do. In the first place, it would not stand factual analysis. The injury to the exterior of the head was the red spot, slight swelling and ultimately the skin abnormality. This was accompanied by nausea, and dizziness, classic symptoms of concussion usually arising from disturbance of the brain cells within the skull. Additionally, as we have pointed out, the major disability is from enhancement of a preexisting brain condition, not from the fracture vel non or the operations vel non. Whether the enhancing effect came from only the fracture and the operations or was caused or contributed to by the blow apart from the fracture and operations, we do not know. The only basis for considering as a separate injury the hairline fracture, located in the same bony structure that was subjected to the blow and not far removed from the point of impact, is appellant's own characterization of it as separate. This is but an artificial construct laid out to avoid the argument rejected in *Luke* that prescription does not begin until the plaintiff knows how serious his injuries are.[8]

motions to dismiss for lack of jurisdictional amount, e.g., *Mitchell v. Great Am. Indem. Co.*, 87 F.Supp. 961 (W.D. La. 1950) (hematoma on head and strained shoulder); *Lee v. Kisen*, 475 F.2d 1251 (CA 5, 1973) (smashed finger with bone chip not uniting).

8 Possibly a later-discovered injury can be "separate" in a physical sense, as, for example, a broken foot first discovered more than a year after immediately-revealed head injuries such as Nivens suffered. Such a case is for the Louisiana courts to decide

We find no Louisiana authority supporting Nivens' position. In *Jones v. Texas & Pacific Ry. Co.*, 125 La. 542, 51 So. 582 (1910), defendant's mule was struck by a train and received a flesh wound insufficient to lame it, "although he manifested a disinclination or disability to move faster than in a walk." He was treated a few days for this wound, put in a pasture to get well and two months later died. Suit was filed more than a year from the death, claiming the loss of value of the mule, the loss of use until he died, and the expense of treating him. The trial court held the entire claim had prescribed. The Supreme Court reversed as to that part of the claim represented by the loss of the mule. It held, however, that the claims for temporary loss of use and for expenses of treatment had prescribed. *Jones* was a suit for injury to property rather than to the person, so that no claim for pain and suffering was involved. The Court pointed out that the flesh wound might not have diminished the mule's value at all:

---

on another day, although it is difficult for us to perceive that the policies of prescription can be met by a metaphysical approach of separating injuries one from another with possibly several different prescriptive periods.

A "little injury first, big injury later" situation was involved in *Guderian v. Sterling Sugar & Ry. Co.*, 91 So. 546 (La., 1922). Plaintiff, who previously had lost the sight of his right eye, was struck over the left eye, causing a gash which received slight medical attention but gave him no concern and did not cause him to lose a day's work. Later it was found that the blow had detached the retina, and plaintiff lost the sight of the left eye. Judge Wisdom explained this case in *Reynolds, supra*, 314 F.2d at 782-83, not on the ground of the trivial nature of the gash over the eye but by a lengthy analysis pointing out that the cause of action arose under the Louisiana Employers' Liability Law, under which knowledge of the date of the occurrence, of some injury resulting from the act causing damage, and an objective manifestation of the injury, are not enough. There was no cause of action until the claimant lost the use of his eye. *Compare Luke, supra*, 124 So. at 626, where the court referred to *Guderian* as a case in which plaintiff suffered no immediate consequence — this is factually erroneous.

> Had plaintiff brought this suit before the death of the mule, a complete defense would have been that, for all that was known, the mule was as valuable as ever, barring the flesh wound, which would, doubtless, soon be healed. Until the fatal nature of the mule's injury revealed itself, therefore, plaintiff had no cause of action, and prescription did not run.

51 So. at 583.

While some of the broad language of *Jones* may give comfort to Nivens, its principles are inapplicable where the alleged injury creates an immediate right to sue. In *Jones* the Louisiana court reasoned that the mule's injury, though instantly sustained, did not produce an effect on value, and the cause of action for loss of the mule remained in the process of development until its death. In the case before us Nivens' cause of action accrued instantly when he experienced legally cognizable injury, pain and suffering.

Nor does *Lucas, supra*, aid Nivens' contentions. Indeed it nails down specifically the sharp dividing line between the period when injury is asymptomatic and the time it becomes symptomatic. Plaintiff therein, allegedly was injured May 28, 1965, and examined by a doctor June 2, 1965. He sued June 2, 1966. His petition stated (with either intentional or accidental artfulness): "Upon going to a physician for a routine checkup on June 2, 1965, plaintiff discovered that he had been caused to suffer a sore tender neck, numbness in the right thumb and slight stiffness in the lumbosacral area as a result of the accident." The

trial court sustained an exception of prescription determined on the face of the pleadings. Defendant asserted on appeal that plaintiff's allegation, quoted above, was a facial revelation that plaintiff was aware of his injuries from the date of his accident, that he did not need to consult a physician to be told that his neck was hurting [from May 28 to June 2]. The Louisiana court construed the petition to allege that the injuries were asymptomatic from May 28 to June 2, 1965, on which date they first manifested themselves, and remanded with directions to permit plaintiff to produce evidence in support of this position. Unlike the *Lucas* plaintiff, immediately following the tortious impact Nivens knew he had sustained injury and thereafter evidenced symptomatic manifestations which were legally sufficient to ground a cause of action. The fact of injury was never asymptomatic, only its full extent.

There is not in this case on the part of Signal any active concealment or lulling of the plaintiff into inaction or any special relationship between Signal and Nivens that operates as an estoppel, which under some circumstances may delay the prescriptive period. *See Perrin v. Rodriguez*, 153 So. 555 (La.App., 1934), and the discussions thereof in *Aegis Insurance Co. v. Delta Fire & Casualty Co.*, 99 So.2d 767 at 787 (La.App., 1957), and in *Reynolds, supra*, 314 F.2d at 784.

Nivens' case has considerable emotional appeal, and in a legal sense superficial appeal. A finder of fact could conclude that, like Nivens, a reasonable person aware of the nasal drainage would not have related it to the bump on the head. Fortuitously and despite his lack of awareness, Nivens made the kind of inquiry

the statute of limitations contemplates. The result of his inquiry to several doctors, none of whom was told of the trauma, was that none found the hairline fracture until too late. Thus, for more than a year, with respect to this injury, Nivens' actions vindicated the policies of the statute. The defect in this argument is, of course, that it carves out the fractured skull and treats it in isolation as though the other and earlier-revealed injuries did not exist. Nivens' entire claim prescribed because the one-year period was triggered by the revealed injuries and the manifestations other than nasal drainage which we have described.

Reversed.

APPENDIX "B"

Albert L. NIVENS, Plaintiff-Appellee,

versus

SIGNAL OIL & GAS CO, INC.,
Defendant Third-Party
Plaintiff-Appellant,

LOUISIANA OFFSHORE CATERERS,
INC., Third-Party Defendant-Appellee,

Travelers Insurance Company,
Intervenor-Appellant.

No. 74-2206.

United States Court of Appeals,
Fifth Circuit.

Nov. 28, 1975.

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(Opinion October 8, 1975, 5 Cir.,
1975, 520 F.2d 1019).

Before GODBOLD, Circuit Judge, SKELTON, Associate Judge,* and GEE, Circuit Judge.

---

* Of the U.S. Court of Claims, sitting by designation.

PER CURIAM:

The District Court denied the claim of Signal against Louisiana Offshore for indemnity and Signal appealed therefrom. Our opinion did not specifically dispose of that facet of the case. Since we hold that plaintiff's claim against Signal had prescribed, the finding that Louisiana Offshore is not liable for indemnity is due to be affirmed. The last sentence of the opinion is therefore amended to read: reversed in part, affirmed in part.

The Petition of plaintiff for Rehearing is denied and no member of this panel nor Judge in regular active service on the court having requested that the court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) plaintiff's Petition for Rehearing En Banc is denied.

APPENDIX "C"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ALBERT L. NIVENS

versus

Civil Action
NO. 72-2527
SECTION "G"

SIGNAL OIL & GAS CO., INC. ET AL

JUDGMENT

This action came on for trial on March 6, 7 and 8 of 1974, Honorable Norman Roettger presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Albert L. Nivens, plaintiff, and against defendant, Signal Oil & Gas Company, in the amount of $175,000.00 with costs and interest at the rate of seven (7%) per cent per annum from date of judicial demand until paid.

New Orleans, Louisiana March ____, 1974.

_____

CLERK OF COURT

Approved as to form:

_____

UNITED STATES DISTRICT JUDGE